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No. 84-1399

In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS FRED WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that count 1 of the indictment returned against him was duplicitous and that the government's evidence was insufficient to support his conviction on count 2.

1. Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on one count of concealing his interests in property to evade the collection of taxes, in violation of 26 U.S.C. 7206(4) (count 1), and one count of conspiracy to conceal his interests in property, in violation of 18 U.S.C. 371 (count 2). He was sentenced to concurrent terms of 15 months' imprisonment on each count and fined $10,000 on the conspiracy count. The court of appeals affirmed in an unpublished judgment order (Pet. App. 1a-4a).

The evidence at trial showed that petitioner was assessed $331,000 in wagering excise taxes in 1974 and that a federal tax levy on petitioner's property was subsequently authorized pursuant to 26 U.S.C. 6331 (Pet. App. 1a). Thereafter, petitioner purchased interests in six parcels of property and one corporation, and, in order to conceal his assets from the Internal Revenue Service, failed to record his interests and took title in the names of other persons. The purchases began in 1975 and continued through 1980 (Pet. App. 1a-2a; see, *e.g.*, Tr. 174-175, 249-250, 298-304). Petitioner took title to several of the properties in the name of Peggy McDaniel. McDaniel testified at trial that petitioner explained that the properties could not be in his own name "because of his problems with the I.R.S." (Tr. 184). She also testified that she and petitioner agreed to share evenly the profits from the sale of one of the properties (Tr. 174).

In affirming petitioner's conviction, the court of appeals reasoned that the government properly charged the seven purchases in a single count because "the several transactions were the means by which" petitioner committed the offense of concealment under 26 U.S.C. 7206(4) (Pet. App. 2a).[1] Thus, count 1 charged only a single offense, consistent with Fed. R. Crim. P. 8(a).[2] The court of appeals also concluded that the evidence was sufficient to support petitioner's conviction for conspiracy in view of his agreement with McDaniel to conceal his interest in the properties and thereby evade the collection of taxes (Pet. App. 2a-3a).

2. The factbound decision of the court of appeals is plainly correct and warrants no further review.

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[1]26 U.S.C. 7206(4) makes it a crime to "conceal[] * * * any property upon which levy is authorized by section 6331, with intent to evade or defeat the * * * collection of any tax."

[2]Fed. R. Crim. P. 8(a) requires "a separate count for each offense."

a. Petitioner's contention (Pet. 6-10) that count 1 was duplicitous is without merit. Although Fed. R. Crim. P. 8(a) prohibits duplicity — charging more than one offense in a single count — Fed. R. Crim. P. 7(c)(1) permits the charging in one count of "one or more specified means" by which an offense was committed. "The line between multiple offenses and multiple means to the commission of a single continuing offense * * * is left, at least initially, to the discretion of the prosecution." *United States* v. *Berardi*, 675 F.2d 894, 898 (7th Cir. 1982). 26 U.S.C. 7206(4) proscribes concealment of assets; certainly nothing in the statute evinces a legislative intent that distinct acts in a single course of conduct *must* be regarded as separate crimes rather than as part of a unified plan to evade the collection of taxes constituting a single violation of the statute.[3] Indeed, petitioner's reading would normally work against defendants.

The court of appeals' treatment of this issue is consistent with that adopted by other courts of appeals with respect to analogous criminal statutes. See, *e.g.*, *United States* v. *Mangieri*, 694 F.2d 1270, 1281 (D.C. Cir. 1982); *United States* v. *Berardi*, 675 F.2d at 897-899; *United States* v. *Edmondson*, 410 F.2d 670, 673 n.6 (5th Cir.), cert. denied, 396 U.S. 966 (1969); *Cohen* v. *United States*, 378 F.2d 751, 754 (9th Cir.), cert. denied, 389 U.S. 897 (1967). Petitioner cites no case interpreting 26 U.S.C. 7206(4) in a manner contrary to that adopted by the court here.[4] In any

[3]Although each of petitioner's property transactions may have "constitute[d] an offense standing alone," Fed. R. Crim. P. 7(c)(1) "necessarily contemplates that [they] * * * may be joined in a single count without offending the rule against duplicity." *Berardi*, 675 F.2d at 898; see *Cohen* v. *United States*, 378 F.2d 751, 754 (9th Cir.), cert. denied, 389 U.S. 897 (1967).

[4]The cases on which petitioner relies (Pet. 7) are inapposite: most address violations of distinct statutory prohibitions joined in a single count or schemes too vaguely defined to constitute a single offense. Although the court in *Bins* v. *United States*, 331 F.2d 390 (5th Cir.),

event, petitioner suffered no prejudice even if count 1 somehow were duplicitous.[5]

b. Petitioner's challenge (Pet. 10-13) to the sufficiency of the evidence supporting his conspiracy conviction is completely lacking in merit. The testimony of petitioner's co-conspirator Peggy McDaniel (page 2, *supra*) adequately established a cooperative undertaking to conceal petitioner's interest in property to evade the collection of taxes, as both courts below concluded. No higher degree of intent was required for either petitioner or McDaniel. See *United States* v. *Feola*, 420 U.S. 671, 687 (1975). There is no conflict with *United States* v. *Vazquez*, 319 F.2d 381 (3d Cir. 1963), because the evidence here showed an agreement between the co-conspirators, while in *Vazquez* "there was no agreement * * * between the parties * * * as explicitly averred in the indictment" (*id.* at 386).

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cert. denied, 379 U.S. 880 (1964), held that each filing of a false document must be charged in a separate count under 18 U.S.C. 1010, its approach to duplicity has not been followed in other circuits or even in subsequent cases in the Fifth Circuit. See *United States* v. *Canas*, 595 F.2d 73, 78 (1st Cir. 1979); *United States* v. *Edmondson*, 410 F.2d at 673 n.6; *Stassi* v. *United States*, 401 F.2d 259, 262 (5th Cir. 1968).

[5]Petitioner obviously had adequate notice of the charges against him and is in no danger of multiple punishments. Petitioner's allusions (Pet. 5, 8) to a statute of limitations problem and his speculation as to the jury verdict (Pet. 8) are wholly lacking in substance. Petitioner did not move to dismiss the indictment as time-barred; in any event, the evidence sufficiently established that his acts of concealment continued into the three-year period immediately preceding the indictment (Pet. App. 3a-4a). Petitioner's failure to request a special verdict as to each transaction or an instruction on the need to find an act in violation of 26 U.S.C. 7206(4) within the limitations period (see Tr. 471) bars his argument that the jury may not have been unanimous as to the act of concealment that took place during that period. See *United States* v. *Mangieri*, 694 F.2d at 1280. Finally, petitioner's conviction on count 1 need not be reviewed because the sentence he received is concurrent with that imposed for count 2 (page 1, *supra*). *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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